

Hon. Judge James L. Robart

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

OLD REPUBLIC TITLE, LTD.,

Plaintiff,

vs.

TROY X. KELLEY and DIANE DUFFRIN  
KELLEY, individually and as a marital  
community,

Defendants.

No. 2:10-cv-00038-JLR

DECLARATION OF ERIN TOLL IN  
OPPOSITION TO ORT'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT

I, Erin Toll, declare as follows:

1. I have been retained as an expert in certain real estate industry practices for Troy and Diane Kelley in this matter.

2. I have been involved in the real estate and title business, as a regulator and as a businessperson, for approximately 13 years. A true and correct copy of my resume is attached to this declaration as Exhibit A. (As I noted in my deposition, in addition to the professional positions relating to the real estate and title business identified on my resume, before law school I worked as a title searcher.)

DECLARATION OF ERIN TOLL IN  
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Seattle, Washington 98121-1128  
(206) 624-8300/fax: (206) 340-9599

1           3.     I served as a regulator of such issues for approximately thirteen years, including  
2 three years as an Assistant Attorney General for the Colorado Attorney General specializing in  
3 title insurance matters, six years as Colorado's Deputy Commissioner of Colorado Division of  
4 Insurance (and its Director of Compliance from 2000 through 2003), and four years as the  
5 Director of the Colorado Division of Real Estate.

6           4.     As the Colorado Deputy Commissioner of Insurance, I was charged with  
7 enforcing Colorado's insurance statutes and regulations, including those applicable to title  
8 insurance companies. I drafted new Colorado regulations governing title insurance companies,  
9 and I also uncovered a complex title insurance scam involving captive title reinsurance that led  
10 to over \$45 million in restitution to title insurance consumers nationwide.

11           5.     As the Director of Colorado's Division of Real Estate, I directed Colorado's  
12 regulatory oversight of real estate appraisers and brokers, mortgage brokers, and developers, and  
13 conducted investigations into the real estate practices that contributed to Colorado's elevated  
14 foreclosure rate.

15           6.     In April 2006, I testified before a Congressional subcommittee (the House  
16 Financial Services Subcommittee on Housing and Community Opportunity) regarding  
17 investigations of the title insurance relating to residential real estate transactions.

18           7.     In the course of my work as a regulator, I came in frequent contact with members  
19 of the title industry and became familiar with many of their business practices, including those  
20 business practices relating to escrow functions such as the collection of settlement and closing  
21 fees. As the Court may be aware, while a title insurance company is not exactly the same thing  
22 as an escrow company, many title insurers—such as Old Republic—also provide escrow services  
23 in connection with residential real estate transactions. The regulation of the “title insurance  
24 industry” therefore often overlaps closely with the regulation of escrow services.  
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26

1           8.     My particular focus as a regulator reviewing and investigating the title industry  
2 was and has been on how those practices affect consumers.

3           9.     In the course of my work as a regulator, I also came into regular contact with  
4 other industry regulators around the country. From 2005 to late 2006 I was the Co-Chair of the  
5 National Association of Insurance Commissioners Title Insurance Working Group. In that  
6 capacity, I worked closely with regulators in numerous jurisdictions around the country and  
7 became familiar with the regulatory issues they faced with respect to the business practices of  
8 title insurance companies, including as respects their concerns about fees charged during the  
9 closing process.

10          10.    From 2005 to late 2006, I was also Chair of the NAIC Class Action Litigation  
11 Working Group. In that capacity, I worked closely with regulators in numerous jurisdictions  
12 around the country and became familiar with the types of issues that were being posed in class  
13 action lawsuits concerning the title industry, including particularly consumer issues.

14          11.    Since leaving my position as Director of the Colorado Division of Real Estate, I  
15 have been engaged in private practice as a real estate broker and agent. In that capacity, I have  
16 had the opportunity to directly witness the charging of reconveyance fees to escrow consumers  
17 and observe whether they have been refunded or not by the charging entities.

18          12.    One of my tasks in this case was to evaluate and describe certain standards,  
19 usages, customs, and practices in real estate transactions with respect to reconveyance post  
20 closing services. I prepared an expert report dated December 23, 2010, in which my expert  
21 opinions and the bases for the same are more fully described.

22          13.    In preparing my report, I relied on my years of service as a regulator and my  
23 experience in private industry. I also reviewed extensive documentation relating to this case.  
24 Attached to this declaration as Exhibit B is a true and correct copy of a list of the documents I  
25 reviewed.  
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1 Based on my years of experience and my review of documents in this case, I have the  
2 following opinions:<sup>1</sup>

3 14. Reconveyance post closing services were commonly understood in the industry to  
4 include monitoring and tracking the clearing of the property title, receiving and obtaining  
5 relevant title files and paperwork necessary from escrow companies and third parties to ensure  
6 the proper release<sup>2</sup> of deeds of trust, and preparation of necessary documents to show clear title, a  
7 repaid loan, recorded reconveyance, and restored title. Some title and escrow companies  
8 performed these reconveyance post closing services "in house," but others contracted out these  
9 services to third party vendors such as PCD.

10 15. The specific fees for performing these services varied from company to company.  
11 If the party performed the tracking and other related services, their fee was earned and refunds  
12 were not given. It was not industry practice for third-party vendors (or title or escrow companies  
13 performing the work "in house") to provide refunds of reconveyance fees to consumers. I am  
14 not aware of any company, whether a title or escrow company that performed reconveyance  
15 post-closing services "in house" or third-party vendors to whom the work was contracted out,  
16 that regularly or even commonly provided such refunds to consumers if in fact reconveyance  
17 post closing services were provided.

18 16. I have reviewed the Complaint in this action and agreement between Old  
19 Republic and PCD for post closing services to be performed by PCD. I have also reviewed the  
20 Motion for Partial Summary Judgment filed by Old Republic in which Old Republic seeks a  
21 declaration that, under the parties' agreement, PCD was to receive a flat \$20 fee of per  
22 reconveyance, regardless of how much work was done by PCD.

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24  
25 <sup>1</sup> This is not an exhaustive list of my opinions.

26 <sup>2</sup> Although my report is not being submitted in full in support of this declaration, I note that there is a typographical error in my report relating to this portion of my opinion. Paragraph 2 of the report states "deed of trust was recorded," when it should have stated "deed of trust was released."

17. Old Republic's position is that PCD was obligated to provide refunds of collected reconveyance fees except to the extent that those fees were used for a nominal \$20 service charge, a trustee fee, and/or a recording fee. Based on this theory, Old Republic argues that PCD should have been providing refunds in most cases.

18. Without stating a conclusion on the legal interpretation of the PCD-Old Republic contract, I can state that in my opinion and experience the provision of such refunds in most cases was not industry practice. The practice of not refunding portions of the reconveyance and tracking and services fee is standard practice in the industry and a practice of which title and escrow companies are aware. As of 2007, there were only five major title insurers in the United States (First American, Fidelity, LandAmerica, Stewart, and Old Republic).<sup>3</sup> Old Republic, as one of only five such insurers, would have known of such industry practices.

19. If there was a consumer protection issue associated with the handling of reconveyance fees in the 2005-2008 time period, e.g., refunds were owing to consumers but not being made, I would have expected to see *some* evidence of that in my capacity either as a regulator, as Co-Chair of the NAIC Title Insurance Working Group or as Chair of the NAIC Class Action Litigation Working Group, but I did not. This confirms for me the lack of an industry expectation or practice that such refunds would be made.

*I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.*

EXECUTED this 11th day of February, 2011.

By 

Erin Toll

<sup>3</sup> Today there are only four as a result of LandAmerica's acquisition by Fidelity.

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